

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY GOERING
Claimant

VS.

DILLON COMPANIES, INC.
Self-Insured Respondent

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Docket No. **264,984**

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Bruce E. Moore on May 11, 2001.

ISSUES

The Administrative Law Judge found the claimant had given timely notice for her left elbow complaints.

The only issue raised on review by the respondent is whether the claimant provided timely notice of her work-related injury. The respondent has not filed a brief with the Board.

The claimant requests the Administrative Law Judge's Order be affirmed.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Mary A. Goering was employed as a night stocker at respondent's Store #25, in Hutchinson, Kansas. Her job duties included unloading trucks, sorting the product, and then stocking and facing the shelves. She testified that her job duties required constant lifting as well as bending and stooping. She worked the 10 p.m. to 6:30 a.m. shift.

On July 18, 2000, at approximately 11 p.m., the claimant was stocking shelves at work when she experienced pain in her chest and left shoulder which radiated down her arm. A co-worker observed claimant grab her left side and had her sit down while the night

stockers' supervisor was summoned. The supervisor transported claimant to the emergency room for treatment.

Because the claimant was having chest pains, the initial treatment was directed at determining whether claimant was having a heart attack. The emergency room testing resulted in an essentially normal workup. The claimant testified she was given medication for costochondritis and she then sought treatment with her family physician, Dr. Graham. She was diagnosed with left elbow tendonitis.

The claimant testified that she advised Mr. Whitis, the assistant store manager, that her elbow problems were due to lifting at work. She stated that this discussion first occurred when she presented Mr. Whitis the work release slip from her physician. Dr. Graham's work release slip dated July 26, 2000, excused claimant from work for seven days and specifically noted left elbow tendonitis.

Bill Whitis, the assistant manager at the store where claimant worked, testified that the claimant left work on July 18th or 19th due to chest pain and that he had follow-up conversations with her when she would present off work slips from her doctor. Mr. Whitis testified that the claimant did not advise him that her problems were related to her work. However, Mr. Whitis agreed that he knew within a week that claimant's doctor diagnosed the left arm problems as tendonitis and that he knew claimant continued to receive treatment for nerve damage to her left elbow.

Mr. Whitis testified that the first time he was made aware that Ms. Goering's problems were work-related was due to a phone call received on January 5, 2001. In the telephone conversation, claimant was concerned that her medical bills were being denied by health insurance and that's when she advised him that it was work-related. Mr. Whitis also received a letter from claimant's attorney the same day.

The respondent notes that claimant filled out a short-term disability form and checked the form to indicate that her disability was not work-related. The claimant testified that she did not understand the form and that the follow-up question indicated to her that a "yes" response was only required if she was currently receiving workers compensation benefits. She further noted that when she talked to the store manager and assistant manager as to what benefits she was entitled to neither of them knew so she contacted the corporate office about short-term disability.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right

depends.¹ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."² The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.³

The testimony is conflicting on the dispositive issue whether the claimant gave timely notice. The claimant alleges she advised the assistant store manager that lifting at work was the cause of her elbow problems. The assistant store manager agreed that claimant provided release slips from her doctor and discussed her treatment but denied that claimant ever alleged that her need for treatment was work-related.

K.S.A. 44-520 requires notice of an accident be provided to the respondent within 10 days of the date of accident. This notice is to state the time and place and particulars of the accident and indicate the name and address of the person injured. The 10-day notice shall not bar recovery if the claimant shows that failure to provide notice within this 10 days was due to just cause. Just cause will allow the notice to respondent to extend to 75 days from the date of accident unless actual knowledge of the accident by the employer or the employer's duly authorized agent renders giving notice unnecessary.

Because claimant left work with complaints of chest pain, the initial trip to the emergency room cannot be said to have provided respondent with actual knowledge that claimant had sustained a work-related injury to her left elbow. However, within a week the claimant provided the respondent with a work release slip from her doctor which specifically noted left elbow tendonitis. The claimant testified that she told the assistant manager that the problem was caused by lifting at work. The assistant manager denies the claimant stated her problem was caused by work.

The Board finds the preliminary hearing record contains testimony from Mr. Whitis that directly conflicts with claimant's testimony. The Board finds the Administrative Law Judge, in granting claimant medical treatment and specifically finding at the conclusion of the preliminary hearing that notice was provided, had to conclude that claimant's testimony was truthful. The Administrative Law Judge had the opportunity to evaluate both of the witnesses' credibility because both witnesses testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Board finds it is appropriate to give some deference to the Administrative Law Judge's conclusions. Therefore, at this point in the proceedings and giving some

¹ K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

² K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 44-501(g).

deference to the Administrative Law Judge's conclusions, the Board finds claimant provided respondent with timely notice of the accident.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁴

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated May 11, 2001, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of July 2001.

BOARD MEMBER

c: Stanley Juhnke, Attorney, Hutchinson, Kansas
Scott J. Mann, Attorney, Hutchinson, Kansas
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁴ K.S.A. 44-534a(a)(2).